United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1530

B

P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

PATRICK McDONOUGH,

Appellant.

Docket No. 74-1530

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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QUESTION PRESENTED

Whether a hearing should be granted to determine whether the indictment should have been dismissed because of the Government's failure to comply with the Prompt Disposition Rules.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Edward R. Neaher) entered April 19, 1974, after a non-jury trial, convicting appellant of uttering three counterfeit ten dollar Federal Reserve Notes, in violation of 18 U.S.C. §472. Imposition of sentence was suspended, and Judge Neaher imposed instead a three-year term of probation.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant was indicted* for possessing and uttering three counterfeit ten dollar Federal Reserve Notes knowing them to be counterfeit.

Prior to trial defense counsel made a motion to dismiss for failure to comply with the Prompt Disposition Rules. It was argued that appellant was arrested on May 14, 1973; that on October 30, 1973, appellant was indicted; that

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*The indictment is B to appellant's separate appendix.

on November 14, 1973, he was arraigned; and that on November 16, 1973, the Government filed a notice of readiness.

The Government countered with an assertion that on May 14, 1973, appellant agreed to cooperate with federal agents. Further, it was stated that the notice of arraignment was mailed to appellant on November 5, I973, at the address given by him to the United States Attorney's office, and that he did not appear for pleading. It was also asserted that the Government was notified on November 12, 1973, that appellant could be present on November 14, 1973, and the date was set for November 14, 1973. Defense counsel urged in her affidavit that the Government had been notified of appellant's change of address prior to its mailing of the notice of arraignment, and that the Government's negligence resulted in the mis-addressing of the letter.

The court denied the motion without the hearing requested by defense counsel (I.7*), saying that this case, with a two-day delay, did not fall within the spirit of the Prompt Disposition Rules.** Defense counsel insisted that

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*Numerals in parentheses preceded by "I" refer to pages of the transcript of January 14, 1974.

**The court apparently believed that because appellant had waived his right to a preliminary hearing before the Magistrate under Rule 5 of the Federal Rules of Criminal Procedure he had also waived ten days of the six months period under the Prompt Disposition Rules (I.19-21).

appellant denied any agreement to cooperate, and she denied any responsibility for the mis-addressed notice of pleading (I.7).

The district judge, saying that there might have been inefficiencies resulting in the mis-addressing of the letter, stated that the two-day delay did not justify dismissal (I.28).*

In fact, although the Government's notice of readiness was dated November 16, 1973, it was filed on November 19, 1973. Thus the notice was filed five -- not two -- days beyond the six month period.**

At trial the government witnesses testified that appellant ordered, successively, three drinks at Poor Peter's Bar and paid for each with a separate ten dollar bill. Two of the bills had identical serial numbers. A police officer, who was a customer at the bar, arrested appellant.

After his arrest appellant was taken to a police station where he was questioned after being advised of his rights. Appellant agreed to permit the agents to search the room he occupied at his brother's home. While at his brother's house, the agents learned that appellant also occupied

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*This must be contrasted to the Assistant United States Attorney's speedy request for a bench warrant when appellant was ten minutes late for that day's court appearance (I.12). Indeed, the court's inclination was to grant the bench warrant (I.13), but appellant did appear.

**See Document #2 of the record on appeal and the docket sheet, which is A to appellant's separate appendix.

a room elsewhere. Without appellant's presence, the agents went to the room, but could not get into it.

They returned to the police station and again interviewed appellant (I.84). They testified they again orally advised him of his rights (I.84). At this point, appellant admitted passing the bills and acknowledged having more bills at his second room (I.88).

Counsel then made a motion to suppress the statement made by appellant in the second interview. At the hearing on the motion, appellant's brother testified that he was present at the re-interview, that the agents told appellant they knew where the room was, and that they could break the door down if appellant didn't let them in (II.8*). Appellant's brother testified that he was at the police station with his brother but that he never heard the agents advise his brother of these rights (II.9).

At the conclusion of the hearing, Judge Neaher made the following statement as part of his oral opinion and verdict:**

> ... I'm simply saying that to the extent that his statement made to Caputo that he had additional currency at the other place which has not been offered

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*"II" references are to the minutes of January 15, 1974.

**The ful opinion is annexed as C to appellant's separate appencis.

in evidence will not be given great weight by me. I am basing my judgment here that this defendant is guilty as charged based entirely on the circumstances under which he passed these bills from which I infer that he had the knowledge and intent that they were counterfeit and accordingly I find him guilty.

(II.68-70).

ARGUMENT

A HEARING SHOULD BE HELD TO DETERMINE WHETHER THE GOVERNMENT HAS VIOLATED THE PROMPT DISPOSITION RULES.

Prior to trial, counsel requested a dismissal of the indictment for failure by the Government to comply with the Prompt Disposition Rules. Throughout the proceedings on this motion, it was assumed by the parties, as well as by Judge Neaher, that the delay involved was a two-day period. Indeed, Judge Neaher premised his decision denying the motion on the belief that a dismissal for a mere two-day delay was not in accord with the spirit of the Rules. However, the docket sheet, as well as the notice of readiness itself, indicates that the notice was not filed until November 19, 1973. The notice of readiness indicates it was served on The Legal Aid Society by mail on November 19, 1973. Thus, the record indicates that the delay was not two days, but five.

It is clear from the Rules that an unexcused delay of any length should result in dismissal of the indictment. The Government can try to bring the delay within the numerous excluded periods under Rule 5, as well as the excusable neglect provision. The failure to establish a justifiable reason for delay should produce the inevitable dismissal. Hilbert v. Dooling, 476 F.2d 355 (2d Cir. en banc), cert. denied, 94 S.Ct. 56 (1973). The excuse for the failure to

comply with the Rules on a theory of de minimus violation is to negate the Rules, which quite clearly make the period in question six months -- not six months and two days or six months and five days.

Because the Judge decided as he did, he denied the request for a hearing and did not determine the length of the delay or whether it was an excluded period. The Government claimed the period was excludable because appellant was cooperating with officials. Defense counsel disputed this assertion. While under United States v. Valot, 481 F.2d 22 (2d Cir. 1973), a period of cooperation is excludable, there was no determination here that appellant was cooperating. Further, if appellant was cooperating, the length of the period in which he was assisting the agents is also critical.

Another period which the Government claimed was excludable was that from the date of the mailing of the notice of arraignment until the date of arraignment. However, the record also raises unresolved questions of fact concerning that period of time. Defense counsel asserted that her office notified the Government of appellant's change of address. She also explained that she was not aware that the notice to appellant was mis-addressed because the form forwarded to her did not reveal the address used. Thus, the issue for the court was whether and why the Government failed to record the change of address.

Collateral to this is why appellant sought, on

November 12, to adjourn the pleading date to November 14. If appellant needed the adjournment because the Government, due to its own inefficiency, failed to advise him of the date of the pleading in sufficient time to be present, then the time should not be calculated against appellant. Nothing is known about the circumstances in which appellant received notice. Further, the delay would not make up the total period in which the Government was out of fime in filing its notice, for the requested adjournment was only two days.

The Judge did articulate a theory for extending the Government's time, although he apparently did not rule premised on that theory. He explained that because appellant waived his right to a preliminary hearing before the magistrate under Rule 5 of the Federal Rules of Criminal Procedure, the Government was entitled to an extra ten days under the Prompt Disposition Rules. The theory contradicts the Rules, which calculate the commencement of the proceedings from the date of arrest, summons, or indictment, whichever is first. Further, the Rules have no suggestion that relieving the Government of the responsibility of establishing probable cause also lengthens the time in which the Government can be ready for trial. The theory just makes no sense.

On the record in this case, the denial of the motion to dismiss is not justifiable. Further, the speedy trial issue cannot be resolved without a hearing and find-

ings of fact. Accordingly, this case should be remanded for a hearing.

CONCLUSION

For the above-stated reasons, the judgment of the District Court should be reversed and the case remanded for a hearing.

Respectfully submitted,

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Certificate of Service

June 17, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.